2010

Dennis Cheek v. Clay Bulloch Construction Inc., Clay Bulloch : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

DENNIS CHEEK, Plaintiff and Appellant, v. CLAY BULLOCH CONSTRUCTION, INC., a Utah Corporation and CLAY BULLOCH, an individual, Defendants and Appellees.	**BRIEF OF THE APPELLEE** Appeal No. 20100479-SC Civil No. 030500447

Appeal from the Fifth District Court, Iron County,
Honorable Paul D. Lyman

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STATEMENT OF PARTIES

Consistent with Utah R. App. P. 24(a)(1) and (b), the caption of this case contains a complete list of all parties to the proceedings below. Nonetheless, the parties to this action are as follows:

1. Appellant/Plaintiff Dennis Cheek
2. Appellee/Defendant Clay Bulloch Construction, Inc.
3. Appellee/Defendant Clay Bulloch

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STATEMENT OF JURISDICTION

This Court has jurisdiction over this matter pursuant to Utah Code Ann. § 78A-3-102(3)(j), § 78A-3-102(4) and § 78A-4-103(2)(j). On June 16, 2010, the Supreme Court of Utah entered an order transferring this case to the Utah Court of Appeals. R. 252.

ISSUES PRESENTED

An appellate court will not overturn a trial court's decision to dismiss a case for failure to prosecute unless it clearly appears that the court abused its discretion and an injustice will result. Here, the trial court found that:

- the case was filed on June 19, 2003;
- no discovery was conducted after January 26, 2005;
- Plaintiff ignored the trial court's repeated instructions to submit a scheduling order throughout 2005 and 2006;
- between 2006 and 2008, Plaintiff engaged in a lengthy attempt to get the Defendants' insurer to pay; and
- there was no activity from 2008-2009.

Did Judge Lyman abuse his discretion in dismissing the Plaintiff's complaint with prejudice for failure to prosecute?

1. Standard of Review for Issue Presented.

The standard of review for the issue presented on appeal is well established: an appellate court should not interfere with a trial court's decision to dismiss a case for failure to prosecute absent an abuse of discretion. Gillmor v. Blue Ledge Corp., 2009 UT

App 230, ¶ 31, 217 P.3d 723 (*citing* Country Meadows Convalescent Ctr. v. Utah Dep't of Health, 851 P.2d 1212, 1214 (Utah Ct. App. 1993)); Charlie Brown Constr. Co., v. Leisure Sports, Inc., 740 P.2d 1368, 1370 (Utah Ct. App. 1987).

2. Preservation of Issue Presented in the Trial Court.

The sole issue on appeal, whether the trial court abused its discretion in dismissing the Plaintiff's complaint with prejudice for lack of prosecution, was properly preserved in the trial court. The Defendants submitted a motion to dismiss for lack of prosecution to the trial court which was subsequently granted by order of the trial court. R. 112-154, 225-235.

DETERMINATIVE RULES

Rule 41(b) of the Utah Rules of Civil Procedure is the determinative rule in this case. Rule 41(b) states in its entirety:

> **(b) Involuntary dismissal; effect thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

Utah R. Civ. P. 41(b) (2008).

STATEMENT OF THE CASE

Plaintiff's case was dismissed with prejudice for lack of diligence in prosecuting the same. On or about June 2001, the Plaintiff requested the Defendants' services for the construction of a Sears Building (hereafter "Building") in Cedar City, Utah. Due to disputes relating to alleged defects in the construction of the Building, the Plaintiff filed his complaint against the Defendants *in June of 2003*. In January of 2010, after years of inaction, the Defendants filed a motion to dismiss for failure to prosecute. The trial court ruled that the Plaintiff was dilatory in prosecuting his case and dismissed the same with prejudice. The Plaintiff is now pursuing this appeal.

STATEMENT OF FACTS

The Defendants do not challenge the trial court's findings of fact as indicated in the trial court's ruling attached hereto as Addendum 1. R. 225-230. Accordingly, the Defendants adopt and recite herein the trial court's findings verbatim.

1. Plaintiff contacted Defendants on or about June 18, 2001 to request Defendants' services for the construction of the Sears Building which property is the underlying basis for this dispute. R. 225.

2. On or about October 1, 2001, Defendants began construction on the Building. R. 225.

3. Defendants completed work on the Building on or about February 25, 2003. R. 225.

4. Plaintiff filed his Complaint on June 19, 2003. R. 225.

5. Plaintiffs submitted interrogatories and requests for production of documents to Defendants on or about September 19, 2003, and received responses from Defendants on November 24, 2003. R. 225.

6. Defendants submitted interrogatories and requests for production of documents to Plaintiff on December 4, 2003, and received responses from Plaintiff on or about January 30, 2004. R. 226.

7. Plaintiff submitted a supplemental discovery request on March 3, 2004, and received a response from Defendants on or about March 17, 2004. R. 226.

8. On or about June 1, 2004, Plaintiff had a substitution of counsel. R. 226.

9. Plaintiff took the deposition of Clay Bulloch on July 29, 2004. R. 226.

10. Defendants took the deposition of Dennis Cheek on September 22, 2004. R. 226.

11. Plaintiff submitted supplemental discovery responses to Defendants on or about January 26, 2005. R. 226.

12. After January 26, 2005, no further Discovery has been conducted in this matter. R. 226.

13. On or about March 9, 2005, Plaintiff called the clerk to schedule a telephonic scheduling conference. R. 226.

14. On or about March 14, 2005, the parties held a telephonic scheduling conference with Judge Lyman. R. 226.

15. During the scheduling conference, Defendants' attorney indicated that he was having difficulty tracking down witnesses. R. 226.

16. During the scheduling conference, Judge Lyman set discovery deadlines and instructed both parties that there would be no extension on the deadlines. Judge Lyman further instructed Plaintiff's attorney to prepare the scheduling order to reflect the determined deadlines. R. 226.

17. Plaintiff did not submit a scheduling order. R. 227.

18. On or about June 28, 2005, the Court sent a copy of the case history to Plaintiff reminding him of his duty to prepare a scheduling order. R. 227.

19. Plaintiff still did not submit a scheduling order. R. 227.

20. On or about October or November 2005, Plaintiff sold the Building. R. 227.

21. On or about November 2, 2005, the Court contacted Plaintiff reminding him of his duty to submit a scheduling order and Plaintiff told the Court that a settlement was still being negotiated. R. 227.

22. On or about April 5, 2006, a court ordered Status Conference was held. The parties agreed to meet and work out a discovery plan to submit to the Court. R. 227.

23. No discovery order was ever submitted. R. 227.

24. On or about June 23, 2006, Plaintiff had a substitution of counsel. R. 227.

25. During July and August of 2006, the Plaintiff's attorney twice attempted to reach Defendants' attorney, by telephone, but the calls were not returned. On September 15, 2006, the Plaintiff's attorney wrote a letter to the Defendants' attorney. R. 227.

26. When the Defendants' attorney did not make timely contact, the Plaintiff's attorney spoke with attorney Jeff Wilcox, who represented the Defendants' insurance carrier. R. 227.

27. Subsequently, the Plaintiff's attorney received a telephone call from the Defendants' attorney. R. 228.

28. The Plaintiff's attorney subsequently received a letter from the Defendants' attorney dated November 13, 2006. R. 228.

29. The Plaintiff's attorney called the Defendants' attorney and visited about the Defendants' insurance carrier and a planned contact with the insurance company attorney. R. 228.

30. The Plaintiff's attorney followed through and contacted the insurance company attorney by a letter to him on November 17, 2006, and a brief visit to him in November, and a more extensive one in late December or early January of 2007. R. 228.

31. On March 27, 2007, the Plaintiff's attorney visited with the Defendants' attorney by telephone and memorialized the content of that conversation in a letter of that date. R. 228.

32. In early May, the Plaintiff's attorney received a letter from the Defendants' attorney dated May 4, 2007, which appeared to be exactly the same letter he had received the proceeding November 13. R. 228.

33. The Plaintiff's attorney immediately responded with a letter dated May 7, 2007. R. 228.

34. During the months that followed, the Plaintiff's attorney made at least two telephone contacts with the Defendants' attorney. R. 228.

35. On January 19, 2008, the Plaintiff's attorney forwarded to the insurance company's attorney a packet of material. R. 229.

36. On February 2, 2008, the Plaintiff's attorney wrote the Defendants' attorney advising of the submission of the packet and material to the insurance company's attorney. R. 229.

37. The Plaintiff's attorney contacted the Defendants' attorney in late April or early May. R. 229.

38. The Plaintiff's attorney wrote to the Defendants' attorney on May 6, 2008. R. 229.

39. On August 27, 2008, the Plaintiff's attorney drove to Cedar City to meet with the Defendants' attorney. R. 229.

40. On or about September 12, 2008, the Defendants' attorney filed a withdrawal of counsel. R. 229.

41. On September 16, 2008, the Plaintiff's attorney filed a Notice to Appear Personally or to Appoint Counsel. R. 229.

42. On October 8, 2008, new counsel appeared for the Defendants. On October 10, 2008, Plaintiff's attorney sent a Motion for a Scheduling and Case Management Conference to the Defendants' attorney, which was never filed with the Court. R. 229.

43. About five weeks later, both attorneys spoke over the telephone. R. 229.

44. The attorneys spoke several times in November, which discussion was memorialized in Defendants' attorney's November 18, 2008, letter to the Plaintiff's attorney. R. 229.

45. The attorneys agreed by letter to meet in December, but that meeting was cancelled. R. 230.

46. Nothing happened in this matter for one year. R. 229.

47. In November 2009, the attorneys spoke by telephone and agreed to a November 24, 2009, meeting. R. 229.

48. The attorneys met on November 24, 2009. R. 229.

49. In a letter from the Plaintiff's attorney dated December 2, 2009, the status of the case was reviewed. R. 229.

50. In mid-December, the Defendants' attorney telephoned the Plaintiff's attorney and told him his client wanted to try to have the case dismissed before proceeding any further. R. 229.

51. On December 29, 2009, the Defendants' attorney confirmed in writing what he had told the Plaintiff's attorney by telephone. R. 229.

52. On January 7, 2010, the Plaintiff's attorney filed a motion for a scheduling conference. R. 229.

53. On January 15, 2010, the Defendants' attorney filed a motion to dismiss for lack of prosecution. R. 229.

SUMMARY OF ARGUMENTS

Plaintiff first argues that this Court should deviate from the established standard of review. It is well established in Utah and throughout the nation that a trial court's dismissal of an action for failure to prosecute will be reviewed on appeal for an abuse of discretion. The Plaintiff should not be allowed to ignore the immense quantity of *stare decisis* establishing the standard of review in this case, and incorporate a "spectrum of deference" standard of review, founded and used primarily in criminal cases, which would result in a *de novo* review.

Plaintiff then argues that the trial court's findings of facts were inadequate. However, the Plaintiff failed to preserve any argument as to the adequacy of the findings. Furthermore, the Plaintiff failed to establish that the trial court's findings were so lacking in support as to be against the clear weight of the evidence. Therefore, the trial court's findings should be left undisturbed and the Plaintiff's additional facts should not be considered in this Court's review.

Plaintiff then argues that the trial court should not have issued findings of fact in the first place. The trial court properly issued findings of fact in this case. It was not an abuse of discretion for the trial court to issue findings of fact when it dismissed Plaintiff's complaint for failure to prosecute; indeed, the Utah Rules of Civil Procedure and established case law require it.

The trial court's finding that the Plaintiff failed to prosecute his case should not be reversed as an abuse of discretion. Prosecution of a case means moving a case forward

according to the rules and directions of the court. The Plaintiff should not be allowed to use peripheral conduct as evidence of prosecution when he ignored the rules and directions of the trial court and his case remained procedurally in the exact same position for nearly five years.

The trial court did not abuse its discretion in its application of the Westinghouse factors. There is no question that the duty to prosecute was the Plaintiff's alone. The Defendants did not engage in any conduct that prohibited or hindered the Plaintiff from moving his case forward according to the rules and directions of the court. Further, the Plaintiff did not provide any reasonable excuse for his lack of due diligence in moving his case forward.

The Defendants have been prejudiced by the Plaintiff's failure to prosecute his case. The events underlying this case began over nine years ago. The facts of this case have grown stale making it extremely difficult to determine causation and damages. Furthermore, the Defendants have been named in a lawsuit for over seven years and have incurred substantial costs in defense of the same.

The Plaintiff's inaction and dilatory conduct in prosecuting his case was inexcusable. There is no question that the Plaintiff had ample time and opportunity to prosecute his case. Plaintiff completed his discovery early and had all the facts he believed were necessary to move forward to trial nearly five years before his case was dismissed for failure to prosecute. Plaintiff had more than ample time and opportunity to

litigate his case but simply failed to do so and has not offered a reasonable excuse for his delay.

ARGUMENT

1. This case should be reviewed under an abuse of discretion standard.

There is no dispute as to what the standard of review is. The Plaintiff correctly states the applicable standard of review on page 4 of his brief: "It has been uniformly understood in Utah case law that dismissals for lack of prosecution are reviewed under an abuse of discretion standard." Appellant's Brief on Appeal at page 4. Indeed, every Utah appellate court decision regarding a Rule 41(b) dismissal for failure to prosecute beginning with the watershed case of Westinghouse Elec. Supply Co. v. Paul W. Larsen, Contractor Inc., 544 P.2d 876, 878 (Utah 1975), has been reviewed under an abuse of discretion standard. *See e.g.* Polk v. Ivers, 561 P.2d 1075, 1076 (Utah 1977); Utah Oil Co. v. Harris, 565 P.2d 1135, 1137 (Utah 1977); Wilson v. Lambert, 613 P.2d 765, 767 (Utah 1980); K.L.C. Inc. v. McLean, 656 P.2d 986, 988 (Utah 1982); Pitman v. Bonham, 677 P.2d 1126 (Utah 1984); Charlie Brown Constr., 740 P.2d at 1370; Maxfield v. Rushton, 779 P.2d 237, 239 (Utah Ct. App. 1989); Meadow Fresh Farms, Inc. v. Utah State University Dept. of Agriculture and Applied Science, 813 P.2d 1216, 1218 (Utah Ct. App. 1991); Country Meadows, 851 P.2d at 1214; Rohan v. Boseman, 2002 UT App 109, ¶ 15, 46 P.3d 753; PDC Consulting Inc. v. Porter, 2008 UT App 372, ¶ 5, 196 P.3d 626; Blue Ledge Corp., 2009 UT App 230 at ¶ 6, 217 P.3d 723.

Despite acknowledging the standard of review—and the mountain of *stare decisis* before him—Plaintiff asks this Court to refute existing precedent and adopt a "spectrum of defense standard" founded in criminal cases, most recently restated in State v. Levin, 2006 UT 50, 144 P.3d 1096, which would result in a *de novo* review. The Plaintiff, however, appears to stand alone as he has failed to cite a single jurisdiction where dismissals for lack of prosecution are reviewed on a standard other than abuse of discretion. Indeed, every one of Utah's neighboring states[1] review dismissals for lack of prosecution under an abuse of discretion standard. *See e.g.*, Old Republic Nat'l Title Ins. Co. v. New Falls Corp., 224 Ariz. 526, 527, ¶ 9, 233 P.3d 639, 641 (App. 2010); Moore v. Cherry, 90 Nev. 390, 393, 528 P.2d 1018, 1020 (1974); Streu v. City of Colorado Springs ex rel. Colorado Springs Utilities, 239 P.3d 1264, 1268 (Colo. 2010); Sato v. Schossberger, 117 Idaho 771, 775, 792 P.2d 336, 340 (1990); Van Keulen v. Cathay Pacific Airways, Ltd., 162 Cal.App.4th 122, 131, 75 Cal.Rptr.3d 471, 478 (2008).

Furthermore, the federal courts also use the abuse of discretion standard when reviewing a dismissal for lack of prosecution. *See e.g.*, Issa v. Fox Rent a Car, 395 Fed.Appx. 514, 516 (10th Cir. 2010); Correspondent Services Corp. v. First Equities Corp. of Florida, 338 F.3d 119, 124 (2nd Cir. 2003); Berry v. CIGNA/RSI-CIGNA, 975

[1] Plaintiff fails to cite—and Defendants have failed to find—a single jurisdiction where a dismissal for lack of prosecution is reviewed under a standard of care other than an abuse of discretion standard.

F.2d 1188, 1191 (5th Cir. 1992); United States v. One Tract of Real Prop., 95 F.3d 422, 425 (6th Cir. 1996); Johnson v. Kamminga, 34 F.3d 466, 468 (7th Cir. 1994).

The uniformity of the standard suggests that there is good reason for its adoption and continued existence. An abuse of discretion standard is the proper standard of review in cases involving a dismissal for lack of prosecution because the trial court's intimate knowledge of all aspects of the case puts it in a far better position than any other court to determine who caused the delay. The trial court has been living with the case since its inception and is keenly aware of the proceedings and any causes of delay therein. Indeed, a trial court has the inherent power to *sua sponte* dismiss a case before it for a failure to prosecute. Charlie Brown Constr, 740 P.2d at 1370. Because district court judges have a better understanding of their litigants and their docket—and whether a party has complied with its orders and directives—discretion is appropriately placed in the trial court's hands to determine whether or not a party has been dilatory in prosecuting its case.

Plaintiff's reliance on State v. Levin is unfounded and cannot be read to overturn the long standing *stare decisis* governing dismissals for failure to prosecute. State v. Levin was a criminal case dealing with self incrimination issues under the Fifth Amendment to the United States Constitution. The Utah Supreme Court granted *certiorari* to "clarify the standard of review to be applied by a Utah appellate court in reviewing a trial court's decision on whether a defendant was subjected to custodial interrogation." State v. Levin, 2006 UT 50, ¶ 1, 144 P.3d 1096.

The Levin court noted that when dealing with mixed questions of law and fact, "it is either not possible or not wise for an appellate court to define strictly how a legal concept is to be applied to each new set of facts" and as such, "the application of such a legal concept incorporates a *de facto* grant of discretion to the trial court." Id. at ¶ 22. However, the Levin court stated that when a court is dealing with a mixed question where uniform application is of high importance, as in the context of Constitutional protections, "policy considerations dictate that the application of the legal concept should be strictly controlled by the appellate courts." Id. at ¶ 23. Thus, the Levin court held that "if we determine that society's interest in establishing consistent statewide standards outweighs other considerations, we grant no discretion to the trial court, and we review the mixed question for correctness." Id.

Clearly the criminal constitutional policy considerations measured by the court in Levin, are far different from the civil policy considerations a court weighs when reviewing a case that was dismissed for failure to prosecute. As the court noted in Levin, it is in the society's best interest that there are consistent statewide standards when dealing with express rights and protections grated by the United States Constitution. Society's interests in establishing consistent statewide standards for cases that have been dismissed for lack of prosecution are not significant enough to strip the trial court of its discretion of dismissal. Indeed, it is in society's best interest to give trial courts discretion to govern their dockets and dismiss stagnant cases to improve judicial economy and access to the courts. Furthermore, the Defendants have failed to find, and

the Plaintiff has failed to cite, any jurisdiction that has found sufficient policy reasons to strip the trial court of its discretion to dismiss a case for failure to prosecute.

Additionally, Plaintiff argues that the "spectrum of deference" standard should be adopted due to the variation that exists in the case law regarding the amount of deference a trial court has in dismissing a case for failure to prosecute. Plaintiff indicates that while the Westinghouse court stated that "the trial court should have a *reasonable latitude of discretion* in dismissing for lack of prosecution," other courts have replaced the "reasonable latitude of discretion" language by stating trial courts have "broad discretion" not to be interfered with unless it "clearly appears" that the lower court has abused its discretion. Appellant's Brief on Appeal at page 4.

The variations in the case law that Plaintiff relies upon for changing the established standard of review are immaterial and are merely distinctions without a difference. The supposed variations do not suggest that the Utah courts should abandon decades of clear law on this issue and go against every other state and federal court on its standard of review. There is no material difference as to whether a trial court has "reasonable latitude of discretion" or "broad discretion" in dismissing a case for failure to prosecute. Despite Plaintiff's attempts to create confusion, the case law is consistent and clear in stating that the trial court has discretion in dismissing a case for failure to prosecute. Simple variations in the semantics the courts use in stating what deference is given to the trial court is not sufficient to overturn the copious amounts of case law establishing the standard of review for cases dismissed for failure to prosecute.

Plaintiff's attempts to change the standard of review merely highlight the difficulty of the Plaintiff's position in establishing that the trial court abused its discretion in this case. The learned district court judge, Paul D. Lyman, has been involved in this case since January 31, 2005. Judge Lyman is keenly aware of the facts of this case as he has been involved in every scheduling conference and has issued orders and directions to both parties. After conducting a hearing on the Defendants' motion to dismiss for failure to prosecute, Judge Lyman issued lengthy findings of fact in his memorandum decision detailing his ruling. The findings of fact reflect Judge Lyman's attention to this case and his acute knowledge and understanding of the same. Because Judge Lyman is in the best position to determine whether the Plaintiff failed to prosecute his case, broad discretion should be given to Judge Lyman's decision. It simply was not an abuse of Judge Lyman's discretion to dismiss this case where the Plaintiff ignored his orders and directions and did nothing for nearly five years to move the case forward.

2. The Plaintiff's argument that the trial court's findings of fact were incomplete was not properly preserved for appeal.

In order to preserve an issue for appeal, "the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue." 438 Main St. v. Easy Heat, Inc., 2004 UT 72, ¶ 51, 99 P.3d 801 (*quoting* Brookside Mobile Home Park, Ltd. v. Peebles, 2002 UT 48, ¶ 14, 48 P.3d 968). This requirement "puts the trial judge on notice of the asserted error and allows for correction at that time in the course of the proceeding." 438 Main Street, 2004 UT 72 at ¶ 51 (*citing* Badger v. Brooklyn Canal

Co., 966 P.2d 844, 847 (Utah 1998)). Issues that are not raised at trial are usually deemed waived. 438 Main Street, 2004 UT 72 at ¶ 51.

A party is required to challenge in the trial court "the adequacy of the court's factual findings to preserve an adequacy of the findings issue for appeal." State ex rel. K.F., 2009 UT 4, ¶ 59, 201 P.3d 985 (*citing* 438 Main Street, 2004 UT 72 at ¶ 56). Rule 52(b) of the Utah Rules of Civil Procedure requires a party to make a motion "not later than 10 days after entry of judgment" to object to and challenge the adequacy of the trial court's findings of fact and allow the judge to "amend its findings or make additional findings." Utah R. Civ. P. 52(b). Requiring a party to object to "the adequacy of the detail of the trial court's findings before appeal allows the trial judge to address and correct, if necessary, the level of detail in his or her findings before the case moves forward." State ex rel. K.F., 2009 UT 4 at ¶ 62. Therefore, if a party does not properly object to the adequacy of the trial court's findings of fact, the party is deemed "to have waived any argument regarding whether the district court's findings of fact were sufficiently detailed." 438 Main Street, 2004 UT 72 at ¶ 56.

A challenge to "the adequacy of the court's findings is notably different from a challenge to the sufficiency of evidence." State ex rel. K.F., 2009 UT 4 at ¶ 61. Indeed, Rule 52(b) clearly preserves a party's ability to challenge the "sufficiency of the evidence to support the findings" when the findings are made by the court. Utah R. Civ. P. 52(b). It is "one thing for a party to say that the judge's findings are erroneous because they are contrary to or unsupported by the evidence, and quite another to say that the findings are

insufficiently detailed." State ex rel. K.F., 2009 UT 4 at ¶ 61. It would be "superfluous to demand that a party challenge the evidentiary support for a court's findings shortly after the court articulates them." Id. But it is "quite a different matter and wholly necessary for a party to challenge and thus afford the trial court 'an opportunity to correct the alleged error' of inadequately detailed findings in order to provide for meaningful appellate review of the court's decision." Id. (internal citations omitted).

Here, the Plaintiff alleges that the trial court's findings of fact were "incomplete," "abridged" and "failed to capture the essence of the actual evidence." Appellant's Brief on Appeal at pages 10 and 32. However, prior to filing his Appellate Brief, the Plaintiff never objected or raised any issue as to the adequacy of the trial court's findings of fact. There simply is no evidence in the record showing that the Plaintiff has preserved his rights to argue the adequacy, or lack thereof, of the trial court's findings of fact. Therefore, the Plaintiff has waived any arguments regarding the detail and specificity of the trial court's findings of fact and this Court should not address the same.

Even assuming, *arguendo*, that the Plaintiff has preserved on appeal the argument that the trial court's findings of fact were inadequate, such an argument nevertheless fails. Plaintiff argues that the trial court's findings are inadequate since they abridge the facts as stated in Plaintiff's counsel's affidavit filed with his memorandum in opposition to summary judgment (Appellant's Brief on Appeal at page 32); however, the trial court is not required to recite verbatim the facts as stated by one party. Indeed, to withstand appellate review, the trial court's findings of fact must simply "show that the court's

judgment or decree follows logically from, and is supported by, the evidence." Jensen v. Jensen, 2009 UT App 1, ¶8, 209 P.3d 1020.

The Plaintiff appears to object to the adequacy of the findings by merely supplementing the findings with additional facts from the record leaving it to this Court to determine whether or not the trial court's judgment logically followed from the findings. The Plaintiff fails to indicate or show how the alleged inadequacies of the findings would prevent the trial court from arriving at its judgment. Indeed, many of the additional facts provided by the Plaintiff are immaterial and not relevant to a determination of whether the Plaintiff exercised due diligence in prosecuting his case.[2]

There is no question that the trial court's judgment that Plaintiff's case be dismissed for failure to prosecute logically follows from the findings. The trial court meticulously issued fifty-three findings that adequately describe the actions, or lack thereof, of the parties throughout the progression of this case. While the findings may not describe every detail of the parties' actions, the findings are sufficient to show how the trial court logically arrived at its judgment that the Plaintiff was dilatory in prosecuting his case.

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[2] As but one example, Plaintiff's objection to fact number 37 is immaterial. Fact 37 reads in its entirety, "[t]he Plaintiff's attorney contacted the Defendants' attorney in late April or early May." Plaintiff then attempts to supplement fact 37 by describing the events surrounding the letter and the contents of the letter. However, the events surrounding the letter and its contents are not necessary for the court to logically arrive at its judgment. The trial court's statement of fact was sufficient to show the Plaintiff's actions to determine whether or not he was diligently moving his case forward. Although the Defendants only specifically address Plaintiff's objections to fact 37, the analysis is representative of Plaintiff's objections to the adequacy of the remaining facts.

3. The Plaintiff has not shown that the trial court's findings of fact were clearly erroneous.

When an appellant claims that the evidence is insufficient to support the trial court's findings of fact, courts of appeal "do not weigh the evidence de novo; great deference is given to the trial court's findings." Matter of Estate of Bartell, 776 P.2d 885, 886 (Utah 1989). In order to successfully challenge a trial court's findings of fact on appeal, "[a]n appellant must marshal the evidence in support of the findings and then demonstrate that despite this evidence, the trial court's findings are so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Id. (*quoting* State v. Walker, 743 P.2d 191, 193 (Utah 1987)). The burden to challenge the trial court's findings of fact on appeal is a heavy one that "appellants often overlook or disregard." West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah Ct. App. 1991). Indeed, this Court has previously indicated:

> In order to properly discharge the duty of marshaling the evidence, the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. After constructing this magnificent array of supporting evidence, the challenger must ferret out a fatal flaw in the evidence. The gravity of this flaw must be sufficient to convince the appellate court that the court's finding resting upon the evidence is clearly erroneous.

Id.

In this case, the trial court has issued factual findings and legal conclusions that are set forth in great detail and are accompanied by a lengthy memorandum decision. Plaintiff argues that the trial court's findings are incorrect; however, the Plaintiff has failed to meet his high burden in challenging the trial court's findings of fact. In

marshaling the evidence, the Plaintiff has included additional evidence that contains extensive quotations and references to the record that the trial court did not include in its findings. Essentially, the Plaintiff has presented a general catalogue of evidence of this case claiming that "literally, nothing has been omitted." Appellant's Brief on Appeal at page 10.

What the Plaintiff has not done however, is to "correlate particular items of evidence with the challenged findings and convince [this Court] of the [trial court's] missteps in application of the evidence to its findings." Majestic Inv. Co., 818 P.2d at 1315. The Plaintiff merely states that he "challenges some of the court's statements as incorrect or incomplete for reasons that are apparent from the actual evidence." Appellant's Brief on Appeal at page 10. Therefore, the Plaintiff has not specifically challenged any of the trial court's findings as clearly erroneous, but has merely provided this Court with additional evidence and left it to the Court to sort out what evidence actually supported the findings and what evidence shows that the findings are clearly erroneous.

The trial court's findings are not "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Matter of Estate of Bartell, 776 P.2d at 886 (internal citations omitted). Indeed, as the trial court indicates, "[t]he underlying facts relevant to this motion are not disputed." R. 255. Furthermore, as the Plaintiff indicates, the findings are "undisputed" and appear to be based directly upon the Defendants' memorandum and Plaintiff's counsel's affidavit. Appellant's Brief on

Appeal at pages 10, 11, and n. 2. It is clear that the trial court's findings had adequate support since they were undisputed; therefore, the Plaintiff's challenges to the correctness of the findings fail and this Court should leave undisturbed the trial court's findings of fact.

4. Because the Plaintiff has not properly preserved its rights on appeal or shown that the trial court's findings of fact were clearly erroneous, the additional facts submitted by the Plaintiff should not be considered and appellate review should be limited to the trail court's findings of fact.

As indicated above, the Plaintiff failed to properly preserve its rights to argue the adequacy of the trial court's findings of fact. If the Plaintiff believed that the trial court's findings were inadequate and required additional facts to demonstrate the conduct of both parties in this case, he could have properly filed an objection with the trial court. However, without properly preserving his rights on appeal, the Plaintiff should not be able to place additional facts before this Court to support his position that the findings were inadequate. Therefore, all of Plaintiff's supplemental facts should not be given consideration by this Court.

Furthermore, great deference should be given to the trial court's findings of fact; as such, this Court has previously stated that it does not lightly disturb the trial court's factual findings. Fisher v. Fisher, 907 P.2d 1172, 1178 (Utah Ct. App. 1995) ("This court 'does not lightly disturb the ... factual findings of a trial court.'"); Matter of Estate of Bartell, 776 P.2d at 886 ("[G]reat deference is given to the trial court's findings"). Accordingly, absent a showing that the trial court's findings of fact were clearly

erroneous, the findings should not be revisited on appeal. Matter of Estate of Beesley, 883 P.2d 1343, 1349 (Utah 1994).

The Plaintiff has not shown that the trial court's findings were clearly erroneous. The trial court carefully poured over the evidence and drafted lengthy statements of fact that it believed were material to the case. As indicated above, the Plaintiff submitted a general catalogue of evidence including many additional facts that the trial court omitted from its findings of fact. This Court should not disregard the trial court's deference and pour over Plaintiff's additional facts to determine which facts should be considered on appeal. The Plaintiff has not met his burden in showing that the trial court's findings of fact were clearly erroneous; therefore, any facts not listed in the trial court's findings of fact should be disregarded and should not be considered or revisited by this Court on appeal.

5. The trial court properly issued findings of fact when it issued its Ruling on the Defendants' Motion to Dismiss for Failure to Prosecute.

The trial court properly issued findings of fact when it dismissed the Plaintiff's complaint with prejudice for failure to prosecute. Indeed, when an action is involuntarily dismissed with prejudice for failure to prosecute, Rule 41(b) requires the trial court to make findings of fact: "If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in Rule 52(a)." Utah R. Civ. P. 41(b). Rule 41 states, "[u]nless the court in *its order for dismissal otherwise specifies, a dismissal under this subdivision* and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, *operates*

as an adjudication on the merits." Utah R. Civ. P. 41(b) (emphasis added). Furthermore, Rule 52(a) states that a "trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b)." Utah R. Civ. P. 52(a).

Due in part, perhaps, to its unambiguous language, the Utah courts have not specifically addressed whether Rule 41(b) requires a trial court to issue findings of fact when dismissing a case for failure to prosecute; however, the propriety of the trial court making findings of fact is further supported by case law indicating that had the trial court failed to issue findings of fact to support its judgment, such an error usually requires the court of appeals to remand for the purpose of allowing the trial court to make such findings. *See e.g.*, Flying Diamond Oil Corp. v. Newton Sheep Co., 776 P.2d 618, 620 (Utah 1989); Jeffs v. Stubbs, 970 P.2d 1234. 1242 (Utah 1998); Anderson v. Thompson, 2008 UT App 3, ¶ 32, 176 P.3d 464. Furthermore, when interpreting the similarly worded Rule 41(b) of the Federal Rules of Civil Procedure, the federal courts have indicated that it is essential for district courts to make findings of fact and conclusions of law supporting a dismissal for failure to prosecute. *See* Hornbuckle v. Arco Oil & Gas Co., 732 F.2d 1233, 1237 (5th Cir. 1984) ("When a district court dismisses an action with prejudice for counsel's failure to prosecute, such findings of fact are essential for our consideration of the inevitable argument that the dismissal was an abuse of its discretion."); Zaddack v. A.B. Dick Co., 773 F.2d 147, 151 (7th Cir. 1985) (emphasizing the import of the trial court making findings of fact when dismissing a claim for failure to prosecute).

Plaintiff's reliance on T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626, 631 (9th Cir. 1987) in support of his argument that the trial court erred in issuing findings of fact is misplaced. In T.W. Elec. Service, the 9th Circuit was addressing a motion for summary judgment and not a motion to dismiss for failure to prosecute. The court correctly addressed that its standard of review for both state and federal claims was *de novo*. T.W. Elec. Service, 809 F.2d at 630. A motion for summary judgment is different from a motion to dismiss for failure to prosecute, because summary judgment presupposes that there are no triable issues of fact. Accordingly, findings of fact are not required. Furthermore, the court in T.W. Elec. Service was not addressing the trial court's ability to make findings of fact during pretrial proceedings; rather, the court merely indicated the universal proposition that if a disputed material fact is raised, the court need not weigh the evidence to resolve the factual dispute at that time. Indeed, when the omitted portion of the paragraph Plaintiff cited from T.W. Elec. Service is considered, it is clear that the court was not addressing the trial court's ability to make findings of fact during a pretrial proceeding on a motion to dismiss for failure to prosecute:

> *The issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.* Thus, at this stage of the litigation, the judge does not weigh conflicting evidence with respect to a disputed material fact. Nor does the judge make credibility determinations with respect to statements made in affidavits, answers to interrogatories, admissions, or depositions. These determinations are within the province of the factfinder at trial.

T.W. Elec. Service, 809 F.2d at 631 (internal citations omitted) (emphasis added).

6. Prosecuting a case means moving the case forward according to the rules and directions of the court; peripheral conduct performed outside of the court that does not move the case forward according to the rules and directions of the court, cannot be considered prosecution of the case.

In order to prosecute a case, the plaintiff must move the case forward according to the "rules or any order of the court." Utah R. Civ. P. 41(b). Likewise, the Utah Supreme Court has determined that a plaintiff fails to prosecute his case if he "fails to move forward according to the rules and the directions of the court." PDC Consulting, 2008 UT App 372, at ¶5 (*citing* Westinghouse, 544 P.2d at 879). Furthermore, both the second and third factors of the test established in Westinghouse specifically address moving the case forward: "(2) the opportunity each party has had to *move the case forward*; (3) what each party has done to *move the case forward*. Westinghouse, 544 P.2d at 879 (emphasis added).

The Plaintiff failed to move his case forward according to the rules and directions of the trial court. Rule 26(f)(3) is unequivocal that it is the plaintiff's responsibility to draft and "submit to the court . . . a proposed form of order in conformity with the parties' stipulated discovery plan." Rule 26(f)(3). Furthermore, during the March 14, 2005 scheduling conference, the trial court set specific discovery deadlines, indicated that there would be no extensions to the same, and specifically instructed *Plaintiff's attorney* to prepare the scheduling order. R. 226-227. Despite multiple directions from the trial

court and Plaintiff's clear obligation to do so under the rules of the court, the Plaintiff completely ignored his responsibility to submit a scheduling order.

It is clear from the trial court's docket that Plaintiff did not engage in any conduct to prosecute his case according to the rules and direction of the trial court for nearly five years. *See* the trial court docket attached hereto as Addendum 2. Prior to filing his motion for a scheduling and management conference on January 7, 2010, Plaintiff's only action on the trial court's record to move this case forward since the certificate of mailing was filed on January 31, 2005 (unrelated to substitution of counsel) was to request a scheduling conference with the trial court on March 9, 2005. Every other action on the trial court's docket was initiated by the trial court to move this case forward. Therefore, the trial court's docket clearly represents that the Plaintiff failed to prosecute this case according to the rules and directions of the trial court for nearly five years.

Throughout his brief, the Plaintiff attempts to rely upon peripheral actions conducted outside of the court to show that he was not dilatory in prosecuting his case; however, such actions did not move the case forward. On March 9, 2005, Plaintiff called the clerk to schedule a scheduling conference. After the scheduling conference with the court on March 14, 2005, the Plaintiff attempts to show he was actively prosecuting his case by contacting the Defendants' attorney on multiple occasions over the phone and meeting in person, and by engaging in a lengthy attempt to try to get the Defendants' insurer to pay. However, the fact remains that when the Plaintiff's attorney filed a motion for scheduling and case management conference with the trial court on January 7,

2010 it was requesting the exact same type of hearing held nearly five years earlier on March 14, 2005. Simply put, the Plaintiff's case was procedurally in the exact same position on January 7, 2010 as it was *nearly five years earlier*.

Defendants are not suggesting that resubmitting insurance claims and engaging in other similar negotiations are unimportant; however, such actions must be conducted in accordance with the rules, directions, and time frames established by the court. Without compliance to the court's rules and deadlines, there is no urgency to resolve the case and a plaintiff could attempt to twist insurance companies' arms and negotiate every possible issue and avenue of the case *ad infintium*. The Plaintiff was not without means to explore alternate means of resolving this case rather than proceed to trial; indeed, the Plaintiff could have allocated additional time in the scheduling order he was required to prepare or simply petitioned the court for additional time to accomplish the same. The Plaintiff should not be allowed to file a lawsuit, ignore the rules and repeated directions of the trial court, and pursue alternative means of resolving his suit without involving the court in the same.

7. The trial court properly applied the Westinghouse factors and did not abuse its discretion when determining the conduct of both of the parties in this case.

The first three Westinghouse factors require a trial court to look to the conduct of both parties and determine what has been done to move the case forward: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; and (3) what each party has done to move the case forward. Westinghouse, 544 P.2d at 879. It is

clear from the trial court's memorandum decision that it gave the first three Westinghouse factors due deference and did not abuse its discretion in application of the same.

A. The burden to prosecute a case is on the Plaintiff.

There can be no doubt that the duty to prosecute a case lies solely with the plaintiff. *See e.g.* Country Meadows Convalescent Ctr., 851 P.2d at 1216 (Utah Ct. App. 1993) (the duty to prosecute is imposed on a plaintiff, not on a defendant); Hartford Leasing Corp. v. State, 888 P.2d 694, 698 n. 2 (Utah Ct. App. 1994) ("The defendant has no general responsibility to move *plaintiff's* action to judgment."). The plaintiff's burden in prosecuting a case is one of due diligence without unusual or unreasonable delay. Meadow Fresh Farms, 813 P.2d at 1218 (*quoting* Charlie Brown Constr., 740 P.2d at 1370). If a plaintiff fails to meet his burden, he must show a reasonable excuse for his lack of diligence. Country Meadows Convalescent, 851 P.2d at 1215 (*quoting* Meadow Fresh Farms, 813 P.2d at 1218); Charlie Brown Constr. Co., Inc., 740 P.2d at 1370 (Utah App. 1987). The defendant's duties are "limited to responding timely to the action, expeditiously attending to discovery, and moving any counterclaim along." Hartford Leasing, 888 P.2d at 698 n. 2.

i. The Plaintiff has not met his burden in showing due diligence in prosecuting his case without unreasonable delay.

The Plaintiff did not prosecute his case with due diligence and without unusual or unreasonable delay. According to the Plaintiff, he completed his discovery "relatively

early in this case." Appellant's Brief on Appeal at page 36. Indeed, the Plaintiff indicates that the "90-day discovery deadline set by the court on March 15, 2005 worked for plaintiff." Id. Despite completing his discovery early in this case and having all the facts necessary to move this case forward, Plaintiff sat on the facts for nearly five years without doing anything substantive to move this case forward according to the rules and directions of the trial court.

At a minimum, it seems due diligence in prosecuting his case would require the Plaintiff to abide by the trial court's orders, directions, and rules. There is absolutely no dispute that the Plaintiff failed to file a scheduling order in this case despite his obligation to do so under Rule 26(f) of the Utah Rules of Civil Procedure and the trial court's specific order during the March 14, 2005 hearing. Furthermore, the Plaintiff was reminded by the trial court of his duty to submit a scheduling order on no less than three separate occasions. Plaintiff's complete disregard of the trial court's orders, reminders, directions, and rules clearly shows a lack of due diligence in prosecuting his case.

In an attempt to downplay the import of following specific orders and directions from the trial court, the Plaintiff states that his claimed failure "to prepare orders is a 'red herring'" and "made no difference in these proceedings." Appellant's Brief on Appeal at page 34. Far from a "red herring," Plaintiff's failure to follow the rules of the court and the trial court's specific order to prepare a scheduling order is a textbook example as to the import of Rule 26(f) and why a scheduling order is necessary. Without a scheduling order in place, the Plaintiff was not bound by specific deadlines governing the progress of

the case; as such, the Plaintiff completed his discovery and then did nothing for nearly five years to prosecute his case according to the rules and directions of the trial court. Indeed, as the trial court accurately stated, after Plaintiff completed his discovery, he "failed to prepare orders, [took] two years to twist an insurer's arm, and then [did] nothing for over a year." R. 233. If the Plaintiff had complied with the trial court's order and its multiple directions to prepare a scheduling order, the Plaintiff would have been bound by the same and would not have been allowed to draw this case out for nearly five years after he completed his discovery and had all the necessary facts to move the case forward to trial.

Furthermore, the Plaintiff cannot satisfy his burden to prosecute his case by engaging in peripheral conduct unrelated to the rules and directions of the trial court. Taking two years to "twist an insurer's arm," making telephone calls, and sending letters to the Defendants' attorney regarding the same cannot be considered prosecution of the case according to the rules and direction of the trial court. As indicated above, Plaintiff's case was procedurally in the same place on January 7, 2010 as it was on March 14, 2005. For nearly five years, Plaintiff did nothing to move this case forward according to the rules and directions of the trial court; therefore, it is clear that the Plaintiff has not met his burden of moving his case forward.

ii. Plaintiff has not shown a reasonable excuse for his lack of due diligence in prosecuting his case.

The trial court summarized the periods of Plaintiff's lack of prosecution in this case as follows:

1. January 2005, to June 2006, there were multiple attempts by the court to keep things moving, but the Plaintiff's attorney failed to produce simple scheduling orders.
2. June 2006 to August or September 2008, there was a lengthy attempt to try to get the Plaintiff's [sic] [Defendants'] insurer to pay.
3. October 2008 to December 2009, there was no activity.

R. 232-233. Despite the court's articulate breakdown of the areas where Plaintiff was dilatory in prosecuting his case and the Plaintiff's attempts to draw attention from those findings, the Plaintiff has not specifically offered any material excuse for his lack of diligence in prosecuting his case.

1. The Plaintiff has failed to offer a reasonable excuse for his failure to move the case forward and follow the rules and directions of the court between January 2005 and June 2006.

As discussed *supra*, the Plaintiff was obligated by Rule 26(f) and the trial court's specific order on March 14, 2005 to prepare a scheduling order. Upon the Plaintiff's failure to prepare a scheduling order, the court contacted the Plaintiff's counsel multiple times to remind counsel of the same in an attempt to keep the case moving forward. Despite his obligation to prepare a scheduling order, and repeated reminders from the trial court, the Plaintiff has failed to offer any reasonable excuse for failing to submit a scheduling order and complying with the rules and orders of the court.

2. The Plaintiff has failed to offer a reasonable excuse for his failure to move the case forward and follow the rules and directions of the court between June 2006 and August or September 2008.

Rather than move this case forward according to the rules and directions of the court, between June 2006 and August or September 2008, the Plaintiff on his own initiative, contacted the Defendants' insurance carrier and began a nearly two-year effort to have the insurance company reconsider the liability issue. Plaintiff offers the Defendants' alleged uncooperative efforts in resubmitting the denied insurance claim and Defendants' alleged lack of cooperation with their own counsel as an excuse for delay in moving the case forward; however, Plaintiff bases such allegations on facts that are not properly before this Court. The trial court did not find that the Defendants failed to cooperate with their counsel or hindered or prohibited the Plaintiff from pursuing efforts in resubmitting the denied insurance claim. Indeed, all such allegations of the Defendants' unwillingness to cooperate with resubmitting the denied insurance claim are based upon the declaration of Kay McIff and not upon the findings of fact as established by the trial court.

Furthermore, even assuming, *arguendo*, that the Defendants did not cooperate with the Plaintiff's efforts in resubmitting the denied insurance claim, the Defendants did not have a duty to pursue and cooperate with such efforts. The duty to prosecute a case lies with the plaintiff and the defendant's duties are "limited to responding timely to the

action, expeditiously attending to discovery, and moving any counterclaim along." Hartford Leasing, 888 P.2d at 698 n. 2. Clearly, the Defendants did not have a duty to cooperate with the Plaintiff in pursuing a denied insurance claim with their own insurance company. Furthermore, as discussed *supra*, Plaintiff's efforts in resubmitting the denied insurance claim did nothing to move the case forward according to the rules and directions of the court. After nearly two years of "arm twisting with the Defendants' insurer," (R. 234) the Plaintiff's case was in the exact same position procedurally as it was before it began such efforts with the insurance company.

Plaintiff's case was not hindered by the Defendants' alleged failure to cooperate in resubmitting the denied insurance claim. If at any point Plaintiff was frustrated with Defendants' alleged unwillingness to pursue renewed efforts with the insurance provider, he could have straightway filed a proposed scheduling order and set deadlines to move this case towards trial. Therefore, the Plaintiff has failed to offer any reasonable excuse for failing to prosecute his case between June 2006 and August or September 2008.

3. The Plaintiff has failed to offer a reasonable excuse for his failure to move the case forward and follow the rules and directions of the court between October 2008 to December 2009.

As is evident from the trial record and from the trial court's findings of fact, there was little activity in this case between October 2008 and December 2009. R. 133. The parties originally agreed to meet in December 2008 to discuss the case; however, the meeting was canceled and no further action was taken by the Plaintiff until November

2009. Other than the holidays and Plaintiff's counsel's involvement in the 2009 legislative session, no excuse is given as to why this case laid dormant for an entire year. Even if this Court determines that the holiday season and Plaintiff's counsel's involvement in the 2009 legislative session were reasonable excuses for failing to move the case forward during that time, the Plaintiff does not offer any excuse as to why he failed to move the case forward between March 2009 and November 2009.

B. It is not the Defendants' burden to prosecute the case nor have the Defendants hindered Plaintiff's ability to prosecute his case according to the rules and directions of the court.

The first three Westinghouse factors require a trial court to look to the conduct of both parties and determine what has been done to move the case forward. *See* Westinghouse, 544 P.2d at 879. The duty to prosecute a case lies with the plaintiff and the defendant's duties are "limited to responding timely to the action, expeditiously attending to discovery, and moving any counterclaim along." Hartford Leasing, 888 P.2d at 698 n. 2.

The Defendants satisfied their duties in moving the case forward by timely responding to Plaintiff's complaint and expeditiously attended to the Plaintiff's discovery requests. There is no question that the Defendants timely filed their answer to Plaintiff's complaint. Further, the Defendants did not hinder or delay the Plaintiff in obtaining and conducting his discovery. Indeed, the Defendants cooperated with the Plaintiff by promptly responding to all discovery requests, cooperated in the scheduling and taking of defendant Clay Bulloch's deposition, and attended all scheduling or status conferences

with the Court. In every instance where the Plaintiff requested discovery, Defendants expeditiously attended to the same. There simply are no facts in this case suggesting that the Defendants hindered or were uncooperative in responding to the Plaintiff's discovery requests.

Furthermore, the Defendants moved their counterclaim along in a manner that did not prejudice, hinder, or prohibit the Plaintiff from moving his case forward. The Defendants preliminarily[3] completed discovery for their counterclaim early on in this case, as they submitted discovery requests to the Plaintiff and took his deposition in 2003 and 2004 respectfully. The Defendants did not compound discovery, make any unreasonable requests, or engage in any uncooperative conduct that would have hindered the Plaintiff's ability to move his case forward. Therefore, the Defendants fulfilled their duty in moving their counterclaim along since there are no facts suggesting that the Defendants' counterclaim hindered or prejudiced the Plaintiff from moving his case forward according to the rules and directions of the trial court.

Ironically, Plaintiff argues that the case cannot be dismissed because Defendants did not aggressively prosecute their claims against him. Defendants' claim was

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[3] After the Plaintiff sold the Building in October or November of 2005, additional discovery was required. Therefore, during April 5, 2006 hearing, the Defendants indicated to the court that they would need additional time to conduct discovery. However, the facts surrounding the Defendants' request for additional time to conduct discovery were not included in the trial court's findings of fact and therefore are not before this Court for review. In any event, the Defendants' request for additional discovery did not prevent the Plaintiff from filing a scheduling order or hinder his ability to move his case forward according to the rules and directions of the court.

compulsory and likely would have been forfeited had they not brought the same. Furthermore, the Defendants' counterclaim was insignificant next to the claims brought by the Plaintiff.[4] Although the Defendants moved their counterclaim along while the case was active—up until May 2005—Defendants were willing to forego their claim if Plaintiff was not going to prosecute. Defendants' inaction in pursuing their counterclaim resulted in the Court dismissing the entire case with prejudice. That is a justifiable result. Resurrecting Plaintiff's case—even though Plaintiff did nothing to move the case towards trial for over five years—because Defendants filed a compulsory counterclaim is not justifiable when nothing in Defendants' conduct or counterclaim prevented Plaintiff from prosecuting his claim.

The Defendants have done nothing to obstruct or impede Plaintiff's ability to prosecute this case and move it forward according to the rules and directions of the court. Therefore, the trial court did not abuse its discretion when it specifically addressed the conduct of the Defendants and indicated that when the facts of the case "are applied to the Westinghouse factors it is clear that the Defendants have not done anything to hinder the progress of case." R. 233.

8. Defendants have been prejudiced by the Plaintiff's failure to exercise due diligence in prosecuting his case.

It is clear that passage of time creates a prejudicial effect. *See* Meadow Fresh Farms, 813 P.2d at 1220. The facts underlying this case began in June 2001, nearly a

[4] As Plaintiff has indicated, "Plaintiff's damage claim is well over six digits, while the counterclaimant [sic] (counterclaim) of defendants' is four digits." Appellant's Brief on Appeal at page 38, n. 9.

decade ago; therefore, after nearly ten years, it is reasonable to assume that the facts in this case are stale. *See* id. Furthermore, passage of time makes it increasingly difficult to locate witnesses and their recollection of the facts, circumstances, and events may have dimmed. Id. Indeed, the Defendants expressed their concern in having difficulty tracking down witnesses nearly five years ago during the scheduling conference on March 14, 2005. R. 226.

Furthermore, the Plaintiff sold the Building that is the underlying basis of his lawsuit on or about October or November 2005. R. 227. As indicated above, Plaintiff's claims for damages were related to alleged defects in the construction of the Building; therefore, if the parties were required to try Plaintiff's case, expert witnesses would have to be retained to determine the causes of the alleged defects and the extent of the damages incurred by Plaintiff. Because the Building has been complete for over eight years and has been under the control of a third party for over five years, it is highly unlikely that the facts and evidence have been properly preserved and documented to enable the experts to properly conduct their necessary reviews to determine causation and damages. R. 227.

Additionally, the Defendants have been prejudiced in that they have been named as defendants in a pending lawsuit for over seven years and have had to run a business with the constant worries and uncertainties associated with the same. *See* PDC Consulting, Inc., 2008 UT App 372 at ¶ 12 (the defendant was prejudiced by remaining a named defendant in a pending lawsuit). The Defendants have also been prejudiced by being named as defendants in this lawsuit as they have had incurred substantial costs in

defending themselves for over seven years. Therefore, there can be no doubt that the Defendants have been prejudiced by Plaintiff's failure to exercise due diligence in prosecuting his case.

9. Since Plaintiff has abused his opportunity to litigate this case, any claims of injustice should be dismissed.

When a "trial court has provided plaintiffs 'an opportunity to be heard and to do justice,' and that plaintiff abuses its opportunity through inexcusable neglect, the trial court does not abuse its discretion in dismissing the case." Country Meadows, 851 P.2d at 1214 (Utah Ct. App. 1993) (*citing* Charlie Brown Constr., 740 P.2d at 1371 (internal citations omitted)). A plaintiff is afforded an opportunity to be heard and have justice where the plaintiff has had a considerable amount of time and opportunity to litigate the case but has failed to do so. *See* PDC Consulting, Inc., 2008 UT App 372 at ¶ 13 (dismissing plaintiff's action for failure to prosecute since plaintiff had more than ample opportunity to litigate the case but simply failed to do so); Rohan, 2002 UT App 109 at ¶ 31, ("Although a dismissal with prejudice deprives Rohan of the opportunity to litigate the merits of his negligence action, Rohan had ample opportunity to litigate his case . . . but abused such opportunity"); Maxfield v. Rushton, 779 P.2d 237, 240 (Utah Ct. App. 1989) (rejecting claim of injustice where plaintiff "had more than ample opportunity to prove his asserted interest and simply failed to do so," and determining that "such non-action is inexcusable").

There is no question that the Plaintiff had ample time and opportunity to prosecute his case. As indicated by Plaintiff, he completed his discovery "relatively early in this case" and that "90-day discovery deadline set by the court on March 15, 2005" was sufficient. Appellant's Brief on Appeal at page 36. Therefore, Plaintiff claims he had all the facts he believed were necessary to move forward to trial nearly five years before his case was dismissed for failure to prosecute. Plaintiff had more than ample time and opportunity to litigate his case but simply failed to do so and has not offered a reasonable excuse for his delay. Thus, Plaintiff's inaction and dilatory conduct in prosecuting his case was inexcusable.

10. The Trial Court did not abandon the Westinghouse approach in analyzing a dismissal for failure to prosecute.

This Court would not abandon the Westinghouse model for analyzing Rule 41(b) motions to dismiss for failure to prosecute if it upholds the trial court's ruling. Indeed, the trial court specifically noted the Westinghouse factors to be considered when dismissing a case for failure to prosecute and applied those factors in its analysis: "When these facts are applied to the Westinghouse factors it is clear that the Defendants have not done anything to hinder the progress of the case." R. 233. It is clear that the trial court used a Westinghouse analysis when dismissing Plaintiff's complaint for failure to prosecute.

CONCLUSION

The Plaintiff had over seven years to prosecute this case. After completing his discovery, the Plaintiff did nothing to move this case forward according to the rules and directions of the court for nearly five years and has not offered any reasonable excuse to justify his failure to prosecute this case. The Building in question was constructed nearly ten years ago; the Building was sold to a third party over five years ago. No experts have been retained or deposed. Defendants warned back in 2005 that evidence was growing stale and that they were having difficulty tracking down witnesses. Nevertheless, Plaintiff repeatedly ignored the trial court's attempts and orders to move this case forward, and Plaintiff did nothing for nearly five years.

Despite the Plaintiff's allusions to peripheral conduct unrelated to moving the case forward according to the rules and directions of the court, the fact remains that this case is procedurally in the exact same position today as it was on March 14, 2005. Therefore, due to Plaintiff's dilatory conduct it is clear that the trial court did not abuse its discretion when it dismissed Plaintiff's complaint for failure to prosecute.

DATED this 31 day of March 2011.

SNOW JENSEN & REECE

V. Lowry Snow
Joshua R. Forest
J. David Westwood

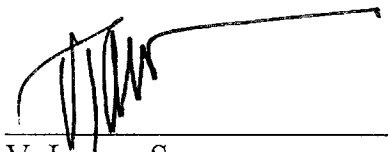
CERTIFICATE OF MAILING

I hereby certify that on the 1ST day of March 2011, I caused eight true and correct copies of the BRIEF OF THE APPELLEE to be delivered via FedEx Overnight mail, postage prepaid, to the following:

The Utah Court of Appeals
450 South State Street
PO Box 140210
Salt Lake City, UT 84114-0210

I further certify that on the 1ST day of March 2011, I caused a true and correct copy of the BRIEF OF THE APPELLEE to be delivered via US mail, postage prepaid, to the following:

THE MCIFF FIRM, P.C.
Kay L. McIff [2193]
225 North 100 East
Richfield, UT 84701



V. Lowry Snow
Joshua R. Forest
J. David Westwood

ADDENDUM

ADDENDUM 1

Trial Court Ruling on Defendants' Motion to Dismiss for Failure to Prosecute

DISTRICT COURT, IRON COUNTY, UTAH
40 North 100 East
Cedar City, Utah 84720
Telephone: 435-867-3250

DENNIS CHEEK, Plaintiff, vs. CLAY BULLOCH CONSTRUCTION INC., a Utah Corporation, and CLAY BULLOCH, an individual,, Defendant.	**RULING ON DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO PROSECUTE** Case No. 030500447 Assigned Judge: Paul D. Lyman

The Court has received the Defendant's Motion to Dismiss for Failure to Prosecute, along with supporting and opposing documents. The underlying facts relevant to this motion are not disputed.

FACTS

1. Plaintiff contacted Defendants on or about June 18, 2001 to request Defendants' services for the construction of the Sears Building which property is the underlying basis for this dispute (hereafter "Building").
2. On or about October 1, 2001, Defendants began construction on the Building.
3. Defendants completed work on the Building on or about February 25, 2003.
4. Plaintiff filed his Complaint on June 19, 2003.
5. Plaintiffs submitted interrogatories and requests for production of documents to Defendants on or about September 19, 2003, and received responses from

Defendants on November 24, 2003.

6. Defendants submitted interrogatories and requests for production of documents to Plaintiff on December 4, 2003, and received responses from Plaintiff on or about January 30, 2004.

7. Plaintiff submitted a supplemental discovery request on March 3, 2004, and received a response from Defendant on or about March 17, 2004.

8. On or about June 1, 2004, Plaintiff had a substitution of counsel.

9. Plaintiff took the deposition of Clay Bulloch on July 29, 2004.

10. Defendants took the deposition of Dennis Cheek on September 22, 2004.

11. Plaintiff submitted supplemental discovery responses to Defendants on or about January 26, 2005.

12. After January 26, 2005, no further Discovery has been conducted in this matter.

13. On or about March 9, 2005, Plaintiff called the clerk to schedule a telephonic scheduling conference.

14. On or about March 14, 2005, the parties held a telephonic scheduling conference with Judge Lyman.

15. During the scheduling conference, Defendants' attorney indicated that he was having difficulty tracking down witnesses.

16. During the scheduling conference, Judge Lyman set discovery deadlines and instructed both parties that there would be no extension on the deadlines. Judge

Lyman further instructed Plaintiff's attorney to prepare the scheduling order to reflect the determined deadlines.

17. Plaintiff did not submit a scheduling order.

18. On or about June 28, 2005, the Court sent a copy of the case history to Plaintiff reminding him of his duty to prepare a scheduling order.

19. Plaintiff still did not submit a scheduling order.

20. On or about October or November 2005, Plaintiff sold the Building.

21. On or about November 2, 2005, the Court contacted Plaintiff reminding him of his duty to submit a scheduling order and Plaintiff told the Court that a settlement was still being negotiated.

22. On or about April 5, 2006, a court ordered Status Conference was held. The parties agreed to meet and work out a discovery plan to submit to the Court.

23. No discovery order was ever submitted.

24. On or about June 23, 2006, Plaintiff had a substitution of counsel.

25. During July and August of 2006, the Plaintiff's attorney twice attempted to reach Defendants' attorney, by telephone, but the calls were not returned. On September 15, 2006, the Plaintiff's attorney wrote a letter to the Defendants' attorney.

26. When the Defendants' attorney did not make timely contact, the Plaintiff's attorney spoke with attorney Jeff Wilcox, who represented the Defendants'

insurance carrier.

27. Subsequently, the Plaintiff's attorney received a telephone call from the Defendants' attorney.

28. The Plaintiff's attorney subsequently received a letter from the Defendants' attorney dated November 13, 2006.

29. The Plaintiff's attorney called the Defendants' attorney and visited about the Defendants' insurance carrier and a planned contact with the insurance company attorney.

30. The Plaintiff's attorney followed through and contacted the insurance company attorney by a letter to him on November 17, 2006, and a brief visit to him in November and a more extensive one in late December or early January of 2007.

31. On March 27, 2007, the Plaintiff's attorney visited with the Defendants' attorney by telephone and memorialized the content of that conversation in a letter of that date.

32. In early May, the Plaintiff's attorney received a letter from the Defendants' attorney dated May 4, 2007, which appeared to be exactly the same letter he had received the proceeding November 13.

33. The Plaintiff's attorney immediately responded with a letter dated May 7, 2007.

34. During the months that followed, the Plaintiff's attorney made at least two telephone contacts with the Defendants' attorney.

35. On January 19, 2008, the Plaintiff's attorney forwarded to the insurance company's attorney a packet of material.

36. On February 2, 2008, the Plaintiff's attorney wrote the Defendants' attorney advising of the submission of the packet and material to the insurance company's attorney.

37. The Plaintiff's attorney contacted the Defendants' attorney in late April or early May.

38. The Plaintiff's attorney wrote to the Defendants' attorney on May 6, 2008.

39. On August 27, 2008, the Plaintiff's attorney drove to Cedar City to meet with the Defendants' attorney.

40. On or about September 12, 2008, the Defendants' attorney filed a withdrawal of counsel.

41. On September 16, 2008, the Plaintiff's attorney filed a Notice to Appear Personally or to Appoint Counsel.

42. On October 8, 2008, new counsel appeared for the Defendants. On October 10, 2008, Plaintiff's attorney sent a Motion for a Scheduling and Case Management Conference to the Defendants' attorney, which was never filed with the Court.

43. About five weeks later, both attorneys spoke over the telephone.

44. The attorneys spoke several times in November, which discussion was memorialized in Defendants' attorney's November 18, 2008, letter to the

Plaintiff's attorney.

45. The attorneys agreed by letter to meet in December, but that meeting was cancelled.

46. Nothing happened in this matter for one year.

47. In November 2009, the attorneys spoke by telephone and agreed to a November 24, 2009, meeting.

48. The attorneys met on November 24, 2009.

49. In a letter from the Plaintiff's attorney dated December 2, 2009, the status of the case was reviewed.

50. In mid-December, the Defendants' attorney telephoned the Plaintiff's attorney and told him his client wanted to try to have the case dismissed before proceeding any further.

51. On December 29, 2009, the Defendants' attorney confirmed in writing what he had told the Plaintiff's attorney by telephone.

52. On January 7, 2010, the Plaintiff's attorney filed a motion for a scheduling conference.

53. On January 15, 2010, the Defendants' attorney filed a motion to dismiss for lack of prosecution.

RULING

The Defendants in this action have moved the Court to dismiss this action, in it's entirety, for failure to prosecute pursuant to Rule 41(b) of the Utah Rules of Civil Procedure. The pertinent part of Rule 41(b) reads as follows:

> (b) Involuntary dismissal; . . . for failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him . . . .

The Rule goes on to make such dismissals an adjudication upon the merits, unless the court specifies otherwise.

This lawsuit was filed on June 19, 2003, almost seven years ago. For the first year and a half it appears that this matter was vigorously addressed through the discovery process, i.e., until January 26, 2005. In March, 2005 a scheduling conference was held. The Defendants' attorney indicated he was having difficulty tracking down witnesses. The Court set deadlines and instructed that there would be no extensions of these deadlines. The Plaintiff's attorney was instructed to prepare the scheduling order, which he did not do. In June, 2005 the Court reminded the Plaintiff's attorney of his duty to prepare a scheduling order. The Plaintiff's attorney again failed to submit a scheduling order. In November, 2005 the Court again reminded the Plaintiff's attorney of his duty to prepare a scheduling order. The Plaintiff's attorney failed a third time to prepare the order. Instead, he reported a settlement was being negotiated. In April, 2006 a court ordered status conference was held. The parties agreed to meet and work out a discovery plan to submit to the court. No discovery plan was submitted.

After the Plaintiff obtained a new attorney in June 2006 various efforts were made by the Plaintiff's attorney to convince the Defendants' insurer to pay. However, two years later in August or September, 2008 those efforts appear to have failed and the Defendants' obtained a new attorney. An attempt to arrange for a scheduling conference was made in October, 2008, but it was unsuccessful. Excepting some attempts by the attorneys to get together in November, 2008, nothing happened in this case for the next year. In December, 2009 and January, 2010 the parties attorneys got together. As a result, the Plaintiff's attorney filed a motion for a scheduling conference and the Defendants' attorney filed this Motion to Dismiss.

In Meadow Fresh Farms, Inc. v Utah State University the Utah Supreme Court has stated as follows:

> The *Westinghouse* court delineated five factors in addition to the length of time elapsed to determine the propriety of a dismissal for failure to prosecute: (1) the conduct of both parties; (2) the opportunity each party has had to move the case forward; (3) what each party has done to move the case forward; (4) the amount of difficulty or prejudice that may have been caused to the other side; and (5) "most important, whether injustice may result from the dismissal." *Id.* Subsequently, the *Westinghouse* factors have been applied by both this court and the Utah Supreme Court in cases involving appeals from Rule 41(b) dismissals.

(Note: *Westinghouse* is Westinghouse Electric Supply Co. v. Paul W. Larsen Contractor, Inc., 544 p. 2d 876 (Utah 1975.)

The history of this litigation can be summarized as follows:

1. January 2005, to June 2006, there were multiple attempts by the court to keep things moving, but the Plaintiff's attorney failed to produce simple scheduling orders.
2. June 2006 to August or September 2008, there was a lengthy attempt to try to get the Plaintiff's insurer to pay.

3. October 2008 to December 2009, there was no activity.

The Plaintiff's attorney claims that he had merely charted "a less combative course through settlement negotiations" with the Defendants' insurer. However, this fails to recognize the 2005-2006 Plaintiff's attorney's lack of effort to even prepare scheduling orders and the 2008-2009 total lack of activity by either party.

When these facts are applied to the *Westinghouse* factors it is clear that the Defendants have not done anything to hinder the progress of the case. The Plaintiff's attorneys have failed to prepare orders, taken two years to twist an insurer's arm, and then done nothing for over a year. Both parties may now have trouble, seven years after the fact, with witness and evidence availability and staleness. The Defendants expressed this concern five years ago.

In Country Meadows v. Department of Health, 851 p.2d 1212, 1215 (Utah App. 1993) the Utah Court of Appeals stated the following:

> On the other hand, the Utah Supreme Court has noted that "[i]f Rule 41(b), Utah Rules of Civil Procedure, is to be effective in expediting and resolving litigation, it must require litigants to prosecute their claims with due diligence." *Fishler*, 538 P.2d at 1325. Therefore, within the above parameters, a trial court retains discretion to dismiss an action "if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse." *Westinghouse*, 544 P.2d at 879. The burden is on the party "attacking a dismissal for failure to prosecute [to] offer a reasonable excuse for its lack of diligence." *Meadow Fresh Farms*, 813 P.2d at 1218.

(Note: *Fishler* is Maxfield v. Fishler, 538 P2d. 1323 Utah 1975.)

Rule 41 (b) places the burden on the Plaintiff. Country Meadows places the burden on the party attacking the motion to dismiss, which is also the Plaintiff. The burden is to show "due

diligence." That can be done by a totality of the circumstances review.

The Plaintiff has not shown due diligence, when the entire history of this lawsuit is examined. The Plaintiff was ordered to prepare scheduling documents and he did not. During the time period that the Plaintiff's attorney was failing to prepare orders, the Defendants' attorney indicated that he was having difficulty tracking down witnesses. The Plaintiff then dropped discovery and went into a protracted period of arm twisting with the Defendants' insurer, which action eventually failed. After the attempt to get the insurer to pay, the Plaintiff simply did nothing for over a year.

CONCLUSION

In reviewing the entire history of this case, the Plaintiff has not shown due diligence in prosecuting this lawsuit. Consequently, the Motion to Dismiss for Failure to Prosecute is granted. This case is hereby dismissed.

Signed on May 12, 2010

Paul D. Lyman
District Court Judge

CERTIFICATE OF SERVICE

On May 13, 2010 a copy of the above was sent to each of the following by the method indicated:

Addressee	Method (M=mail, P=in person, F=Fax, D=Drop Box/Clerk'sOffice)	Addressee	Method (M=mail, P=in person, F=Fax, D=Drop Box/Clerk'sOffice)
K. L. McIff 225 North 100 East Richfield, Utah 84701	[m]	V. Lowry Snow Tonaquint Business Park, Bldg B 912 West 1600 South, Suite 200 St. George, Utah 84770	[m]

Lynne Nowka

ADDENDUM 2
Trial Court Docket Including Minute Entries

FIFTH DISTRICT COURT- CEDAR
IRON COUNTY, STATE OF UTAH

DENNIS CHEEK vs. CLAY BULLOCH CONSTRUCTION

CASE NUMBER 030500447 Contracts

CURRENT ASSIGNED JUDGE
PAUL D. LYMAN

PARTIES

Defendant - CLAY BULLOCH CONSTRUCTION

Defendant - CLAY BULLOCH
Represented by: V LOWRY SNOW
Represented by: JAMES G HARDMAN

Plaintiff - DENNIS CHEEK
Represented by: KAY L MCIFF
Represented by: MARK K MCIFF

ACCOUNT SUMMARY

TOTAL REVENUE	Amount Due:	240.75
	Amount Paid:	240.75
	Credit:	0.00
	Balance:	0.00

REVENUE DETAIL - TYPE: COMPLAINT - NO AMT S

Amount Due:	155.00
Amount Paid:	155.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COUNTER 2K-10K

Amount Due:	75.00
Amount Paid:	75.00
Amount Credit:	0.00
Balance:	0.00

REVENUE DETAIL - TYPE: COPY FEE

Amount Due:	10.75
Amount Paid:	10.75
Amount Credit:	0.00
Balance:	0.00

CASE NOTE

CASE NUMBER 030500447 Contracts

PROCEEDINGS

06-19-03 Filed: Complaint No Amount
06-19-03 Judge J. PHILIP EVES assigned.
06-19-03 Fee Account created Total Due: 155.00
06-19-03 Filed: Cover sheet
06-19-03 Filed: Complaint
06-19-03 COMPLAINT - NO AMT S Payment Received: 155.00
Note: Code Description: COMPLAINT - NO AMT S
06-19-03 Filed: Complaint
07-21-03 Filed: Entry of Special Appearance as Counsel
07-21-03 Filed: Motion to Quash Service
07-21-03 Filed: Memorandum of Points and Authorities in Support of Motion to Quash Service
08-11-03 Filed return: Summons
Party Served: BULLOCH, CAROLYN
Service Type: Personal
Service Date: July 23, 2003
08-12-03 Filed: Counter 2K-10K
08-12-03 Fee Account created Total Due: 75.00
08-12-03 COUNTER 2K-10K Payment Received: 75.00
Note: Code Description: COUNTER 2K-10K
08-12-03 Filed: Answer and Counterclaim
CLAY BULLOCH CONSTRUCTION

09-02-03 Filed: Answer of Dennis Cheek to Counterclaim of Clay Bulloch Construction Inc., A Utah Corporation and Clay Bulloch, an individual
10-07-03 Filed: Certificate of Delivery
10-07-03 Filed order: Voluntary Recusal
Judge J. PHILIP EVES
Signed October 07, 2003
11-26-03 Filed: Certificate of Service by Mailing
12-05-03 Filed: Certificate of Service by Mailing of Defendant's First Set of Interrogatories to Plaintiff
12-05-03 Filed: Certificate of Service By Mailing of Defendant's First Requests for Production of Documents to Plaintiff
12-19-03 Filed: Cover letter from Marchant Kohler & Kyler
12-19-03 Filed: Notice of Lis Pendens
03-04-04 Filed: Certificate of Delivery
04-01-04 Filed: Certificate of Service by Mailing
04-02-04 Filed: Certificate of Service by Mailing
04-05-04 Filed: Notice of Deposition
05-27-04 Filed: Notice of Appearance of Counsel
06-02-04 Filed: Substitution of Counsel
09-10-04 Filed: Notice of Deposition
01-31-05 Filed: Certificate of Mailing
01-31-05 Filed: Notice of Judicial Assignment of an Active (non senior)

Judge
01-31-05 Judge PAUL D. LYMAN assigned.
03-09-05 Note: **Attorney Randall Allen called clerk requesting a telephonic scheduling conference which was set with Judge Lyman's clerk and both counsel.
03-09-05 Notice - NOTICE for Case 030500447 ID 9007873
TELEPHONIC SCHEDULING CONF is scheduled.
Date: 03/14/2005
Time: 01:00 p.m.
Location: Room 1
DISTRICT COURT BUILDING
40 NORTH 100 EAST
CEDAR CITY, UT 84720
Before Judge: PAUL D. LYMAN

**Clerk will call both counsel and after they are on the line, will make conference call to Judge Lyman
03-09-05 TELEPHONIC SCHEDULING CONF scheduled on March 14, 2005 at 01:00 PM in COURTROOM 1 - (West) with Judge LYMAN.
03-14-05 Minute Entry - Minutes for TELEPHONIC SCHEDULING CONF
Judge: PAUL D. LYMAN
Clerk: gwenk
PRESENT
Plaintiff(s): DENNIS CHEEK
Plaintiff's Attorney(s): RANDALL C ALLEN
Defendant's Attorney(s): CHRISTOPHER J MARCHANT

HEARING

Off record: This conference is being held by telephone. The Court inquires as to whether discovery has been completed. Mr. Marchant informs parties that the County has given him an inaccurate legal description and that he intends to file an amended complaint and an amendment to the lien. Mr. Allen will stipulate to amending the complaint; however, amending the lien may be a point of argument at trial. Mr. Marchant also states that he has difficulty tracking down witnesses.
It is decided that discovery is to be all completed within 90 days. The Court reiterates that all discovery must be done; there will be no extensions on this deadline. All witnesses must be identified 45 days prior to the cut-off date and all depositions must be completed in 45 days. All motions along with responses must be filed within 100 days at which time another telephonic conference will be held to schedule trial if needed. A Notice to Submit or Request for Oral Argument may also be filed by counsel. Mr. Allen is to prepare the scheduling order which is to reflect the deadlines set today. The

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Court anticipates a ruling or completion of trial within approximately 150 days.
03-15-05 Filed: Amended Notice of Lis Pendens
03-18-05 Filed: Amended Answer and Counterclaim

CLAY BULLOCH

06-28-05 Note: **copy of case history to Mr. Allen as he was to prepare a scheduling order which has not been received. Tracking extended an additional month to allow clerk time to check on status of this case.
11-02-05 Note: **clerk checked with counsel; settlement is still being negotiated. Tracking extended
11-04-05 Filed: Letter requesting hearing for summary judgment
11-04-05 Note: given to Gwen to set
11-08-05 Note: Clerk spoke to Mr. Allen concerning his letter requesting hearings. He wants to wait to set a hearing on the Motion for Summary Judgment until the motion is filed. Case placed on tracking to set after Motion filed.
02-08-06 Notice - NOTICE for Case 030500447 ID 9261273
TELEPHONIC STATUS is scheduled.
Date: 02/22/2006
Time: 08:30 a.m.
Location: COURTROOM 1 - (West)
DISTRICT COURT BUILDING
40 NORTH 100 EAST
CEDAR CITY, UT 84720
Before Judge: PAUL D. LYMAN

Please be available at the date and time above. The Court will initiate the call.
02-08-06 TELEPHONIC STATUS scheduled on February 22, 2006 at 08:30 AM in COURTROOM 1 - (West) with Judge LYMAN.
02-22-06 Minute Entry - Minutes for TELEPHONIC CONFERENCE
Judge: PAUL D. LYMAN
Clerk: gwenk
PRESENT
Plaintiff's Attorney(s): RANDALL C ALLEN
Defendant's Attorney(s): CHRISTOPHER J MARCHANT
Tape Count: 8:40

HEARING

COUNT: 8:40
Off record: Mr. Allen reports that negotiations are ongoing. There is a possibility of settlement. Mr. Marchant concurs; however he reports that if negotiations are not successful, he will need time to complete more discovery.

Counsel stipulate to the setting of a Telephonic Status Conference within 45 days. Telephonic is set for April 5, 2006 at 8:30 a.m. The Court will initiate the call.
02-22-06 Notice - NOTICE for Case 030500447 ID 9270194
TELEPHONIC STATUS is scheduled.
Date: 04/05/2006
Time: 08:30 a.m.
Location: COURTROOM 1 - (West)

DISTRICT COURT BUILDING
40 NORTH 100 EAST
CEDAR CITY, UT 84720
Before Judge: PAUL D. LYMAN

The Court will initiate the call.
02-22-06 TELEPHONIC STATUS scheduled on April 05, 2006 at 08:30 AM in COURTROOM 1 - (West) with Judge LYMAN.
04-05-06 Minute Entry - Minutes for TELEPHONIC STATUS CONFERENCE
Judge: PAUL D. LYMAN
Clerk: gwenk
TELEPHONE CONFERENCE
PRESENT
Plaintiff's Attorney(s): RANDALL C ALLEN
Defendant's Attorney(s): CHRISTOPHER J MARCHANT

HEARING

Off record: Mr. Marchant informs the Court that he will need significant time for discovery. He and Mr. Allen agree to meet to work out a discovery plan and then submit it to the Court. The Court so orders. (case placed on tracking to ensure discovery plan is received)
06-06-06 Filed: Notice of Withdraw as Counsel
06-16-06 Filed: Notice to Appoint Counsel or Appear and Represent Self
06-26-06 Filed: Appearance of Counsel
09-12-08 Filed: Notice of Withdrawal as Counsel (Chris Marchant)
09-17-08 Filed: Notice to Appear or Appoint Counsel
10-09-08 Fee Account created Total Due: 10.75
10-09-08 COPY FEE Payment Received: 10.75
Note: --
10-10-08 Filed: Entry of Appearance
01-07-10 Filed: Motion for scheduling and management conference